

482. EAI denies the allegations of **Paragraph 262** of the Complaint. EAI has repeatedly advised Comcast that EAI and USS will consider these reported safety violations on a case-by-case basis provided that a professional electrical engineer licensed in the State of Arkansas certifies in writing that the clearance of any specific residential drop complies with the applicable edition of the NESC. Comcast, however, does not dispute specific residential drop clearances but rather continues to couch its objections in broad generalities.

483. EAI denies the allegations of **Paragraph 263** of the Complaint. EAI affirmatively states that the vast majority of the residential drops reported as a safety violation could not meet the standard of any edition of the NESC.<sup>702</sup>

484. EAI denies the allegations of **Paragraph 264** of the Complaint.

485. EAI admits that it has used the standard of the applicable edition of the NESC to grandfather a small number of conditions reported by USS as EAI safety violations as alleged in **Paragraph 265** of the Complaint. EAI denies the remaining allegations contained in Paragraph 265 of the Complaint.

486. EAI denies the allegations of **Paragraph 266** of the Complaint.

487. EAI denies the allegations contained in **Paragraph 267** of the Complaint. EAI affirmatively refers to its responses to Paragraphs 79 and 114 of the Complaint above. EAI affirmatively states that out of a total of 6,532 reported safety violations involving anchors, only 1,333 have been corrected by the Complainants. EAI further states that with respect to

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<sup>702</sup> Declaration of Wilfred Arnett at Attachment C.

Comcast, approximately one half of the anchor violations reported to Comcast involved locations where Comcast has not installed *any* down-guy wire or anchor to support the unbalanced load caused by Comcast attachments.

488. EAI denies the allegations of **Paragraph 268** of the Complaint. EAI affirmatively states that written permission will be given to attach to EAI anchors provided that the Complainants are able to demonstrate that the additional load placed on EAI anchors does not exceed the permitted load requirements of Section 26 – Strength Requirement of the NESC. Again, with respect to Comcast, approximately one half of the anchor violations reported to Comcast are for locations where Comcast has not placed any down-guy wire or anchor as necessary.

489. EAI admits the allegations of **Paragraph 269** but affirmatively states that none of the Complainants have shown that any of their piggy-backed anchors meet the strength requirements of the NESC nor has EAI given permission, written or verbal, to attach to EAI anchors.

490. EAI admits that it requires 9 inch clearance between communications cable in the span as alleged in **Paragraph 270** of the Complaint. EAI denies the remaining allegations contained in Paragraph 270 of the Complaint. EAI affirmatively states that this EAI specification is a term of the pole attachment agreements. EAI further states that the NESC did not allow a 4 inch separation between communication cables in the span until Section 235. H. 2. first appeared in the 2002 edition of the NESC.<sup>703</sup> On the other hand, the Complainants, through Mr. Harrelson, argue that subsection 235. H. which first became a standard in the 2002 edition of the NESC should not be applied to require 12 inches of clearance between communication messengers (see

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<sup>703</sup> Declaration of Lonnie Buie, Professional Engineer, Pettit & Pettit Consulting Engineers, Inc., at ¶ 74.

Para 256 of the Complaint) but does apply to only require 4 inches of clearance between communication cables in a span. The Complainants are attempting to selectively apply NESC standards when they may be of some benefit but reject application of these same standards when they may be in violation of those standards.

491. EAI admits that it requires 40 inches clearance between communication cable and neutral electrical wire at the pole as alleged in **Paragraph 271** of the Complaint. EAI affirmatively states the 40 inch clearance is a basic requirement of the NESC and a specification term included in the pole attachment agreements. The conditions which must be met to allow a minimum of 30 inches of clearance are contained in a footnote to Table 235-5 of the NESC. This footnote states that the 40 inch clearance may be reduced to 30 inches for supply neutrals meeting Rule 230.E.1. entirely dielectric fiber-optic supply cables meeting Rule 230.F.1.b., and cables meeting Rule 230.C.1. where the supply neutral or messenger is bonded to the communication messenger.

492. Rule 230.E.1. relating to supply neutrals provides that "[n]eutral conductors that are effectively grounded throughout their length and associated with circuits of 0 to 22 kV to ground may have the same clearances as guys and messengers".

493. Rule 230.F.1.b. relating to dielectric fiber-optic supply cables provides that "[c]able defined as "fiber-optic – supply" that is entirely dielectric, or supported on a messenger that is entirely dielectric, shall have the same clearance from communications facilities as required for a neutral conductor meeting Rule 230.E.1."

494. Rule 230.C.1. relating to supply cables provides as follows:

1. Cables that are supported on or cabled together with an effectively grounded bare messenger or neutral, or with multiple concentric neutral conductors, where any associated neutral conductor(s) meet(s) the requirements of Rule 230.E.1. and where the cables also meet one of the following:

(a) Cables of any voltage having an effectively grounded continuous metal sheaf or shield, or

(b) Cables designed to operate on a multi-grounded system at 22 kV or less and having semiconducting insulation shielding in combination with suitable metallic drainage.

495. First, it should be noted that the Complainants have also objected to EAI bonding requirement (see Paragraph 260 of the Complaint), which is required as a condition to allow 30 inches of clearance between communication cable and neutral electric wire at the pole.

496. Second, EAI requires 40 inches of clearance since the lowest energized conductor may be an effectively grounded neutral or an energized secondary wire or cable. Communication workers are not qualified to differentiate between an energized secondary wire and an effectively grounded neutral wire much less have the knowledge necessary to determine if the above-stated technical conditions have been met to allow for an exception to the rule which requires 40 inches of clearance between communication cable and neutral electric wires at the poles.

497. Also, the Institute of Electrical and Electronics Engineers, Inc. recognizes that communications workmen are not typically accustomed to working in the neutral space close to power conductors and considers it important to minimize the operations a communications workman might have to perform under such circumstances.<sup>704</sup> The EAI 40-inch clearance specification provides additional safety to non-qualified employees, contractors and subcontractors of the Complainants.

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<sup>704</sup> Declaration of Lonnie Buie, Professional Engineer, Pettit & Pettit Consulting Engineers, Inc., at ¶ 28.

498. EAI also states that of the clearance violations cited for Comcast, only 1,019 (or 30%) are between 30 and 40 inches and may or may not qualify for this exception. Ninety-seven percent are within 30 inches and are a violation under any version of the NESC.<sup>705</sup>

499. EAI admits that EAI requires 30 inch clearance between Complainants' cable and the neutral wire in the span and that the NESC will allow 12 inch clearance if certain conditions are met as alleged in **Paragraph 272** of the Complaint. EAI denies the remaining allegations contained in Paragraph 272 of the Complaint. EAI affirmatively states that the Complainants have not met the conditions under the NESC to allow for a 12 inch clearance. The basic requirement concerning this clearance issue is set forth in Rule 235. C.2.b.1. of the NESC. This rule states that "line wires, conductors, and cable supported at different levels on the same structure shall have vertical clearances at the supporting structures so adjusted that the clearance at any point in the span shall be not less than any of the following: (a) for voltages less than 50 kV between conductors, 75% of that required at the supports by Table 235-5". The separation required by Table 235-5 is 40 inches. Therefore, 75% of 40 inches equals 30 inches required clearance between communication cable and the neutral wire in the span. The 12 inch clearance which the Complainants wish to fall under is an exception to this basic rule which requires certain conditions to be met. The exception states as follows: EXCEPTION 1: neutral conductors meeting Rule 230.E.1. and supply cables meeting Rule 230.C.1. (including their support brackets) running above and parallel to communication cables where the supply neutral or messenger is bonded to the communication messenger at intervals specified in Rule 92.C., may have a clearance of 12 inches at any point in the span provided that a clearance of 30 inches

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<sup>705</sup> Declaration of Wilfred Arnett at ¶ 24

is maintained between the supply conductors and cables and the communication cables of the supporting poles.”

500. Again, it is important to note that the Complainants have objected to the bonding requirement (see Paragraph 260 of the Complaint) in order to qualify for the exception to the basic 30 inch clearance requirement of the NESC. Also, the Complainants have not shown in any instance that 30 inches has been maintained between EAI supply conductors and communication cables at the pole in order to fall within this exception. In open-wire secondary installation, EAI’s conductor nearest to cable is usually a phase or energized conductor and, therefore, 12-inch clearance is not allowed under the NESC. Also EAI’s bundled-cable secondary does not allow for the 12-inch clearance exception under the NESC. EAI further reiterates that communications workers are not qualified to identify which EAI conductors can fall within the 12-inch clearance exception and, for the sake of safety to these workmen, EAI requires the Complainants to maintain 30 inches of clearance between cable and EAI’s wires in a span.

501. EAI admits that EAI requires 40 inch clearance between the riser guard and the communications space on the pole and that these violations need to be corrected by the Complainants as alleged in **Paragraph 273** of the Complaint. EAI denies the remaining allegations contained in Paragraph 273 of the Complaint.

502. EAI admits that primary cable is 230.C.1.b. cable as alleged in **Paragraph 274** of the Complaint. EAI denies the remaining allegations contained in Paragraph 274 of the Complaint. EAI affirmatively states that secondary voltage cables do not apply to the exception referenced in

*Paragraph 274 of the Complaint and require 40 inches clearance.*<sup>706</sup> In addition, for the cables that qualify for the exception, 40 inch clearance must be maintained between the communications cable and the bottom of the terminator or the point where the concentric wires are bundled, whichever is lower.<sup>707</sup> EAI further states that Exception 1 noted in Paragraph 274 of the Complaint also requires that the conductors or cables cannot be in the climbing space on the pole. EAI further states that communications workers are not qualified to identify any particular type of EAI cable necessary to determine if an exception of the NESC applies and, therefore, EAI requires CATV attachments to be a minimum of 40 inches below the top of the conduit on all underground riser installations for the safety of communications workers. Apparently, the Complainants' own expert is not able to differentiate between 230.C.1.b. primary cable and secondary cable. The examples that Mr. Harrelson offers to illustrate this exception are not primary cable risers at all, but rather secondary risers which require 40 inches of clearance.<sup>708</sup>

503. EAI denies the allegations of **Paragraph 275** of the Complaint.

504. EAI denies the allegations of **Paragraph 276** of the Complaint.

505. EAI denies the allegations contained in **Paragraph 277** of the Complaint. EAI affirmatively states that EAI installs street and outdoor lighting in accordance with EAI standards set out in the pole attachment agreements and the applicable standards of the NESC.

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<sup>706</sup> Declaration of Lonnie Buie, Professional Engineer, Pettit & Pettit Consulting Engineers, Inc., at ¶¶ 77, 79.

<sup>707</sup> Id.

<sup>708</sup> Declaration of Lonnie Buie, Professional Engineer, Pettit & Pettit Consulting Engineers, Inc., at ¶ 80.

506. EAI admits that secondary riser guards for underground electric service must be 40 inches from communication space on poles as alleged in **Paragraph 278** of the Complaint. EAI denies the remaining allegations contained in Paragraph 278 of the Complaint. EAI affirmatively states that EAI installs secondary risers in accordance with EAI specifications and the NESC.<sup>709</sup> EAI further states that if cable facilities cause a violation with respect to EAI facilities then the Complainants are required to pay for any make-ready work necessary to allow cable attachments to be made in accordance with the standard of the NESC and specifications of EAI.

507. EAI denies the allegations contained in **Paragraph 279** of the Complaint. EAI affirmatively states that EAI installs drip-loops, secondary attachments on poles, and outdoor lighting in accordance with the specifications of EAI and the standards of the NESC.<sup>710</sup> EAI further states that Paragraphs 277 through 279 of the Complaint are the Complainants' attempt to attribute as many of the reported safety violations to EAI knowing full well that the true source of the problem which created this violation is the shoddy and haphazard construction practices followed for years by the Complainants in making cable attachments to EAI poles.

508. EAI denies the allegations in **Paragraph 280** of the Complaint.

509. EAI denies the allegations contained in the first sentence of **Paragraph 281** of the Complaint. EAI admits that Cox was assigned responsibility to make corrections as alleged in the second sentence of Paragraph 281 of the Complaint. EAI affirmatively states that EAI

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<sup>709</sup> Declaration of Lonnie Buie, Professional Engineer, Pettit & Pettit Consulting Engineers, Inc., at ¶ 80.

<sup>710</sup> Declaration of Lonnie Buie, Professional Engineer, Pettit & Pettit Consulting Engineers, Inc., at ¶¶ 81-82.



constructed a new line in the Malvern area and installed a 45 foot pole in anticipation of installing a three phase transformer bank. However, after the pole was set, the land owner placed approximately two feet of fill dirt around the pole. After this fill had been placed but before EAI installed its transformer bank, Cox installed their cable on the pole. EAI then installed the transformer bank within its allocated top 13 feet of its pole. With Cox measuring from the ground up and EAI measuring from the top of the pole down, the CATV cable and EAI's conductors ended up less than 40 inches apart on the pole.<sup>711</sup> EAI suggested that Cox could lower its CATV cable to a point 40 inches below EAI's conductors and still maintain proper ground clearance. Cox suggested that they would try to make this adjustment. EAI affirmatively states that this incident hardly evidences an "abiding contempt for its obligations to communications attachers" but instead demonstrates an effort by EAI personnel to resolve problems in a cooperative fashion.

510. EAI denies the allegations of **Paragraph 282** of the Complaint.

511. EAI admits that it would be unjust and unreasonable for EAI to require Complainants to pay to correct EAI violations as alleged in **Paragraph 283** of the Complaint but affirmatively states that this is not the case.

### **DISCRIMINATION**

512. EAI denies the allegations in **Paragraph 284** of the Complaint. EAI affirmatively states that in instances where violations by other attachers, including telephone companies, have been noted, EAI has requested that such violations be cured. For example, EAI and USS have met

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<sup>711</sup> Declaration of Wayne Harrell at ¶ 28.

with SBC in order to obtain corrections of violations noted in the course of the USS safety inspections. On information and belief, SBC is currently working to cure approximately 600 violations in the Little Rock area.<sup>712</sup>

513. EAI denies the allegations in **Paragraph 285** of the Complaint. EAI affirmatively states that pursuant to SBC's joint use agreement with EAI, SBC had the contractual right to share EAI's anchors.<sup>713</sup> The Complainants have no such right. EAI affirmatively refers to its response to the allegations in Paragraphs 242 and 284 of the Complaint.

514. EAI denies the allegation in **Paragraph 286**.

#### **COST ALLOCATION**

515. EAI denies the allegations in **Paragraph 287** of the Complaint. EAI affirmatively states that although the inspections objected to by Complainants were designed only to inspect cable attachments (and therefore the costs of such inspections should be borne solely by Complainants), EAI has nonetheless assessed itself a reasonable portion of such inspection expense to reflect those instances where, over the course of the inspections, USS, incidental to its primary function of assessing Complainants' cable plant, identified safety violations by EAI or its joint use partner.

516. EAI denies the allegations of **Paragraph 288** of the Complaint. EAI states that the terms of the USS Work Codes referenced by Complainants in Exhibit "30" are generic work codes

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<sup>712</sup> Declaration of Tony Wagoner at ¶ 11.

<sup>713</sup> Declaration of David B. Inman at ¶ 43.

utilized by USS for billing purposes.<sup>714</sup> Line items in the billing associated with a code only *indicate that at least one of the tasks associated with a code was performed.* EAI affirmatively states that despite Complainants' misleading implication to the contrary, USS did not perform all of these tasks for each pole. The purpose and scope of the USS inspections was limited to inspect and identify CATV attachments and locate violations of the safety provisions of the relevant pole attachment agreements and the NESC.

517. The inspections were not an inspection or inventory of all EAI poles or of all EAI facilities on its poles.<sup>715</sup> EAI affirmatively states that the scope of the work performed by USS was necessitated in large part by the lack of cooperation from Complainants in identifying the location of their attachments on EAI facilities. In every instance, Complainants refused or were unable to provide EAI or USS adequate maps or other information setting forth the location of their attachments. In instances where maps were provided by a Complainant, such maps were so inadequate or inaccurate as to require USS to inspect all poles where CATV attachments could reasonably be expected to be found.<sup>716</sup> EAI affirmatively states that in many instances, the CATV attachments discovered on its poles were unauthorized, and EAI had never been provided notice of the attachment in direct breach of the various pole attachment agreements with EAI. EAI affirmatively states that in many instances, as described herein, EAI was experiencing electrical service outages and emergency calls resulting from faulty installation and maintenance

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<sup>714</sup> Declaration of Wilfred Arnett at ¶ 7.

<sup>715</sup> Declaration of Wilfred Arnett at ¶ 7.

<sup>716</sup> Declaration of Tony Wagoner at ¶ 9.

of CATV cable and, despite requests from EAI to the relevant cable operator to make repairs, such repairs were never made.<sup>717</sup>

518. Given the large number of unauthorized attachments and electrical service outages caused by Complainants' faulty construction and inadequate maintenance of their facilities, EAI was unable to rely upon the representations of Complainants as to the location of their attachments or the adequacy of their construction, or that repairs had been completed. Furthermore, EAI affirmatively states that the scope of work performed by USS in the course of its inspections was necessitated by the need to provide Complainants necessary information regarding the location and number of their attachments and the specific nature of the noted violations.<sup>718</sup> The very allegations raised in the Complaint in disputing the violations discovered by USS over the course of its inspections prove the necessity for the type of detail that Complainants now object. Poles without CATV attachments were recorded but not measured, and only required a negligible amount of time to observe.<sup>719</sup>

519. EAI states that the terms of the USS Work Codes speak for themselves and to the extent the allegations in **Paragraph 289** conflict with such terms, those allegations are denied. EAI affirmatively refers to its response to the allegations of Paragraph 288 of the Complaint.

520. EAI states that the terms of each Worksheet provided each Complainant speak for themselves, and to the extent the allegations in **Paragraph 290** of the Complaint conflict with

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<sup>717</sup> Declaration of David B. Inman at ¶ 5; Comcast, Alliance, and WEHCO outage and trouble tickets attached as Exhibit "90," "91," and "92."

<sup>718</sup> Declaration of Tony Wagoner at ¶ 7.

<sup>719</sup> Declaration of Tony Wagoner at ¶¶ 6, 9.

such terms those allegations are denied. EAI affirmatively refers to its response to the *allegations of Paragraph 288 of the Complaint.*

521. EAI denies the allegations of **Paragraph 291** of the Complaint and affirmatively states that USS gathered certain information for all poles inspected necessary to adequately and efficiently locate the pole and determine whether the cable plant attached to the pole was in compliance with the pole attachment agreements and the NESC.

522. EAI denies the allegations in **Paragraph 292** of the Complaint. EAI affirmatively states that the purpose of the USS safety inspections was to identify CATV attachments and locate safety violations of the relevant pole agreements and the NESC. The safety inspections were not an inspection or inventory of all EAI poles or of EAI facilities or SBC attachments to its poles. As the work performed by USS did not constitute an inspection or inventory of EAI facilities or SBC attachments, there was no benefit to EAI (other than providing notice of EAI safety violations observed incident to inspecting CATV facilities).<sup>720</sup> EAI affirmatively states that the information recorded by USS is all relevant to Complainants' facilities. For example, the scope of work performed by USS in the course of its inspections was necessitated by the need to provide Complainants the necessary information regarding the location and number of their attachments and the specific nature of the noted violations. Further, measuring the heights of attachments and mid-spans from the lowest power conductor shows that the inspections are focused on cable facilities on EAI's poles and is not a means to inventory or inspect all of EAI's facilities. Moreover, noting safety violations by EAI or other attachers benefits the cable operators in protecting its employees and contractors. Finally, providing the relevant cable

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<sup>720</sup> Declaration of David B. Inman at ¶ 13.

operator recommendations regarding correction of its violations obviously benefits the cable operator.<sup>721</sup>

523. EAI denies the allegations in **Paragraph 293** of the Complaint.

524. EAI denies the allegations in **Paragraph 294** of the Complaint and affirmatively refers to its responses to paragraph 292 of the Complaint.

525. EAI states that the ruling set down in *Cable Texas, Inc. v. Entergy Services, Inc.* speaks for itself and EAI specifically denies the Complainants' self-serving characterization of such ruling. EAI denies the remaining allegations in **Paragraph 295** of the Complaint.

526. EAI states that the ruling set down in *First Commonwealth Communications v. Virginia Electric Power Co.* speaks for itself and EAI specifically denies the Complainants' self-serving characterization of such ruling. EAI denies the remaining allegations in **Paragraph 296** of the Complaint. EAI affirmatively states that it has allocated to itself and paid \$780,115 of the safety inspection costs or approximately 33% of inspection costs.<sup>722</sup>

527. EAI denies the allegations in **Paragraph 297** of the Complaint. EAI affirmatively states that the Complaint is merely a continuation of Complainants' ongoing indifference to the safety of their employees, contractors, and the public in general; their refusal to accept responsibility for the construction and maintenance of their facilities on EAI poles; and their willful delays in correcting their breaches to the various agreements with EAI. Complainants, through this Complaint, attempt to paint EAI and its contractor, USS, as villains bent on harming innocent

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<sup>721</sup> Declaration of Tony Wagoner at ¶¶ 7-11.

<sup>722</sup> Declaration of David B. Inman at ¶ 27.

cable operators. This is nothing more than a transparent effort to shift the focus of this dispute from their calculated refusals to abide by their agreements or meet minimum safety standards. However, Complainants' endless misstatements of fact and the tone adopted in their Complaint cannot obscure the fact of Complainants' failure to properly construct and maintain their facilities or meet their obligations under their agreements.<sup>723</sup>

528. EAI denies the allegations in **Paragraph 298** of the Complaint. EAI affirmatively states that its allocation of the costs of the safety inspections is just and non-discriminatory. EAI affirmatively refers to its response to the allegations in paragraphs 40, 292, 293, and 294 of the Complaint. EAI allocated inspection costs among itself and each cable company with attachments in a particular circuit by multiplying total inspection costs for a circuit by a fraction. The numerator of the fraction was equal to the number of contacts a cable company had within a specific circuit. The denominator was equal to the total number of contacts of all cable companies within the circuit, plus the number of safety violations attributed to EAI and telephone companies for the same circuit. By apportioning inspection costs using this formula, EAI has made a good faith attempt to assign a monetary value to itself for any incidental benefit

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<sup>723</sup> For instance, in a recent letter, counsel for Complainants writes that the inspections involved detailed information of all facilities, including Entergy's facilities. As stated more fully elsewhere the inspections were limited to cable plant. Ms. Sapir similarly mischaracterizes the inspections as a "complete plant inventory of every pole" and involves "performing a detailed and sophisticated analysis of every pole" – all at Alliance's expense. The Complainants ignore the plain and simple facts regarding the scope of the inspection and that EAI has paid its fair and equitable portion of inspection cost. EAI also did not have any prior notice of the build out of cable in Greenbrier, Arkansas in 1996, as stated by Ms. Sapir nor did EAI approve or issue permits with respect to this project as stated by Ms. Sapir. Until such time as counsel for Complainants and representatives of the Complainants are willing to accept the true and indisputable facts surrounding the necessity, scope and process of the safety inspections and the widespread safety violations caused by the existing condition of their cable plant, EAI agrees that further efforts in informal resolution would be fruitless. See Declaration of Brad Welch at ¶ 13.

received as a result of these safety inspections.<sup>724</sup> EAI allocated to itself and paid a substantial *portion of the total inspection costs to account for safety violations due to EAI and/or telephone company facilities found incidental to an inspection of cable plant.* EAI has paid inspection costs of \$780,115 and has billed Comcast the amount of \$1,286,773; Alliance the amount of \$249,949; and WEHCO the amount of \$15,228. To date, Comcast, Alliance and WEHCO have failed and refused to pay any amount for their allocated portion of the safety inspection costs.

529. EAI states that the terms of the December 12, 2003 Comcast Allocation Invoice speak for themselves and to the extent the allegations in **Paragraph 299** of the Complaint conflict with such terms those allegations are denied. EAI affirmatively states that Complainants' selection of one invoice is neither random nor representative of the invoices as a whole.

530. EAI states that the terms of the December 12, 2003 Comcast Allocation Invoice speak for themselves and to the extent the allegations in **Paragraph 300** of the Complaint conflict with such terms those allegations are denied.

531. EAI states that the terms of the December 12, 2003 Comcast Allocation Invoice speak for themselves and to the extent the allegations in **Paragraph 301** of the Complaint conflict with such terms those allegations are denied. With respect to footnote 303 of the Complaint, EAI affirmatively states that the cost to inspect poles where it is later determined there are no CATV attachments is nonetheless allocated to each complainant according to the formula described in response to the allegations in paragraph 298 of the Complaint. As set out in response to paragraph 288 of the Complaint, Complainants failed or refused to timely provide EAI with

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<sup>724</sup> Declaration of David B. Inman at ¶¶ 19, 21, 31.



accurate maps showing the location of their attachments. Further, test safety inspections found *so many unauthorized attachments to EAI poles* that EAI would have been unable to rely upon such maps even had they been timely provided. As a result, USS inspected poles where there was a reasonable probability that CATV attachments were present.<sup>725</sup> Again, the need for these additional inspections was the fault of the complainants and not EAI or USS.

532. EAI states that the terms of the December 12, 2003 Comcast Allocation Invoice speak for themselves and to the extent the allegations in **Paragraph 302** of the Complaint conflict with such terms those allegations are denied. EAI affirmatively states that the formula for allocating costs to EAI is logical and consistent with the purpose of the CATV safety inspections as well as the formula for allocating costs to other entities.

533. EAI states that the terms of the December 12, 2003 Comcast Allocation Invoice speak for themselves and to the extent the allegations in **Paragraph 303** of the Complaint conflict with such terms those allegations are denied. EAI affirmatively states that the formula for allocating costs to EAI is logical and consistent with the purpose of the CATV safety inspections as well as the formula for allocating costs to other entities. EAI specifically denies the remaining allegations in paragraph 303 of the Complaint.

534. EAI states that the terms of the April 19, 2003 Alliance Allocation Invoice speak for themselves and to the extent the allegations in **Paragraph 304** of the Complaint conflict with such terms those allegations are denied. EAI affirmatively states that Complainants' selection of one invoice is neither random nor representative of the invoices as a whole.

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<sup>725</sup> Declaration of Tony Wagoner at ¶ 9.

535. EAI states that the terms of the April 19, 2003 Alliance Allocation Invoice speak for *themselves and to the extent the allegations in Paragraph 305 of the Complaint conflict with* such terms those allegations are denied. EAI affirmatively states that the formula for allocating costs to EAI is logical and consistent with the purpose of the CATV safety inspections as well as the formula for allocating costs to other entities.

536. EAI denies the allegations in **Paragraph 306** of the Complaint. EAI affirmatively states that WEHCO has been billed for the CATV safety inspections of their facilities under the same formula as that for Comcast and Alliance and as described in response to the allegations in paragraph 298 of the Complaint.

537. EAI denies the allegations in **Paragraph 307** of the Complaint. With respect to footnote 303 of the Complaint, EAI affirmatively states that the CATV safety inspections did not entail a survey of all of EAI's facilities on the inspected circuits but, instead, was only a safety inspection of cable plant on poles. Again, due to Complainants' failure to provide accurate, if any, maps of the locations of their attachments and due to the complainants' willful breach of their agreements by placing unauthorized attachments on EAI poles, EAI was also forced to search for poles with CATV attachments.<sup>726</sup> The cost to inspect such poles should be borne by Complainants due to their lack of cooperation in the process and breaches of the various agreements between the parties.

538. EAI denies the allegations in **Paragraph 308** of the Complaint. With respect to footnote 310 of the Complaint, EAI affirmatively states that Complainants misstate the holding in

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<sup>726</sup> *Id.*

*Knology* and the holding in *Knology* is properly limited to the facts in that case and is distinguishable from the facts here. In *Knology*, Georgia Power was notified that Knology, a cable over-builder, was going to construct an independent network to provide video, telecommunications, and internet services in Augusta, Georgia. Georgia Power required Knology to use two Georgia Power contractors to perform the necessary work on Georgia Power's poles. A post-construction inspection was performed, though at least a portion of such inspection occurred over a year after the construction was completed. The Commission determined that the portions of the post-construction inspection occurring over a year after completion of construction could not be charged to Knology. The Commission did not, however, rule that post-construction inspection charges incurred within a year of construction were "routine inspections" could *only* be recovered through annual rents as Complainants assert. Instead, those charges allocated to Knology for post-construction inspections within one year were recoverable by Georgia Power outside of the rental fees.

539. EAI affirmatively states that, here, the inspections performed on the Comcast, Alliance and WEHCO facilities were not post-construction inspections as was the case in *Knology* nor were they routine inspections. Rather, these inspections were the result of continued outages, customer complaints of low-hanging wires, downed poles, property damage and emergency service calls all due to Complainants' failure to properly construct and maintain their facilities on EAI's poles.<sup>727</sup>

540. Further, EAI had attempted to get Complainants to recognize their obligations under their various agreements (as well as their obligations to the safety of their employees and the public)

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<sup>727</sup> Declaration of David B. Inman at ¶ 42.

and correct the numerous safety violations. Only after these efforts to obtain voluntary compliance by the Complainants failed were the safety inspections undertaken. Even then, the Complainants were given the opportunity to participate in these safety inspections – though in each case they refused. EAI further affirmatively states that in this case, EAI did not select or otherwise dictate the contractors used by Complainants to construct or repair their facilities on EAI's poles. Those contractors (including USS in at least one instance), were selected by the Complainants so that the timing and quality of the work were exclusively within Complainants' control, not EAI's.

541. Additionally, as explained previously, except in the case of Cox, EAI was not given prior notice by Complainants when they would commence construction on their facilities. Likewise, EAI was not given notice of when construction was purportedly complete so that EAI was unable to schedule inspections to be performed within a year of completion. EAI further affirmatively states that Comcast, Alliance and WEHCO each willfully breached their various pole attachment agreements with EAI by placing unauthorized attachments to EAI's poles without notice to EAI. For example, EAI has determined that there are at least 12,592 unauthorized Comcast attachments on EAI's poles.<sup>728</sup> Given that Complainants placed attachments and performed work on their facilities on EAI's poles without prior notice or permission, EAI cannot be held to an arbitrary deadline for performing inspections when the Complainants withheld information regarding construction and attachments from EAI. Complainants should be estopped from asserting that EAI's safety inspections were untimely. EAI affirmatively states that in virtually all, if not all, instances, Complainants were the last

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<sup>728</sup> Declaration of David B. Inman at ¶ 40.

entity to attach to the EAI poles. Further, the Complainants have each been informed that if they disagree with any instance deemed a violation or wish to challenge a finding that it was responsible for a violation, they should present contrary proof to USS or EAI. However, Complainants have not challenged any such findings.<sup>729</sup>

542. EAI denies the allegations in **Paragraph 309** of the Complaint. EAI affirmatively refers to its response to paragraph 308 of the Complaint. EAI affirmatively states that in April 2001, Comcast and EAI met to discuss problems with Comcast's facilities on EAI's poles.<sup>730</sup> In August of 2001, Comcast and EAI again met and Comcast represented to EAI that it had resolved all of the problems with its attachments on EAI poles.<sup>731</sup> Despite these representations, EAI continued to experience service problems including outages, customer complaints, and emergency service calls resulting from Comcast's failure to properly construct and maintain its plant. As a result, a random safety inspection was performed later that year. The random safety inspection revealed the falsity of Comcast's representations that it had corrected the problems with its facilities and necessitated more extensive safety inspections.<sup>732</sup> EAI affirmatively states that in the case of WEHCO's facilities in Searcy, on information and belief, WEHCO continued to make significant changes and additions to this facility far beyond 1995. Further, the majority of these additions and modifications were made without notice or approval by EAI, all in breach of the WEHCO Agreement.<sup>733</sup> Likewise, in the case of Alliance, on information and belief, it has continued to make modifications and additions to its plant while rarely providing EAI notice

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<sup>729</sup> Declaration of Tony Wagoner at ¶¶ 25, 27, 50, 51, 57.

<sup>730</sup> Comcast Action Plan, Exhibit "21."

<sup>731</sup> Comcast Action Plan, Exhibit "23."

<sup>732</sup> Declaration of Gary Bettis at ¶ 18; Declaration of Tony Wagoner at ¶ 42.

<sup>733</sup> Declaration of Michael Willems at ¶ 14.

or gaining approval for new attachments to EAI's poles, again in breach of the Alliance Agreement.

543. EAI denies the allegations in **Paragraph 310** of the Complaint. EAI affirmatively refers to its response to paragraphs 308 and 309 of the Complaint.

544. EAI denies the allegations in **Paragraph 311** of the Complaint. EAI affirmatively refers to its response to paragraphs 308 and 309 of the Complaint.

545. EAI denies the allegations in **Paragraph 312** of the Complaint. EAI affirmatively refers to its response to paragraphs 308 and 309 of the Complaint.

546. EAI denies the allegations in **Paragraph 313** of the Complaint. EAI affirmatively refers to its response to paragraphs 308 and 309 of the Complaint.

547. EAI denies the allegations of **Paragraph 314** of the Complaint. EAI affirmatively refers to its responses to paragraphs 308 and 309 of the Complaint.

548. EAI denies the allegations in **Paragraph 315** of the Complaint. EAI affirmatively refers to its response to paragraphs 308 and 309 of the Complaint.

549. EAI denies the allegations of **Paragraph 316** of the Complaint. EAI affirmatively states that Complainants misstate the holding in *Cable Television Ass'n of Georgia v. Georgia Power Co.* and EAI affirmatively refers to its response to paragraphs 307, 308 and 309 of the Complaint.

550. EAI denies the allegations in **Paragraph 317** of the Complaint.

551. EAI denies the allegations in **Paragraph 318** of the Complaint. EAI affirmatively refers to its responses to the allegations in paragraphs 287, 288, 301 and 307 of the Complaint.

552. EAI states that the terms of the December 12, 2003 invoice to Comcast speak for themselves and to the extent the allegations in **Paragraph 319** of the Complaint conflict with such terms those allegations are denied. EAI affirmatively refers to its responses to the allegations in paragraphs 287, 288, 301 and 307 of the Complaint. EAI affirmatively states that, despite request, Comcast refused to provide EAI maps of the locations of its attachments. At this time, EAI can only speculate that this refusal is an acknowledgement that either Comcast has no idea where its attachments are located or that Comcast is aware of the multitude of unauthorized attachments it has willfully attached to EAI's poles and is attempting to continue concealing this information from EAI. EAI affirmatively states that Complainants' selection of one invoice is neither random nor representative of the invoices as a whole. EAI affirmatively states that Comcast is attached to 837 poles (76% of the poles inspected) in Circuit G925 with an additional 15 attachments outside its 12 inches of allocated space. Within this circuit, Comcast had 586 separate violations consisting of 284 NESC violations at the pole, 75 NESC violations in mid-span, 73 missing anchors, 85 missing bonds and 69 missing guy markers.<sup>734</sup> EAI denies the remaining allegations in paragraph 319 of the Complaint.

553. EAI denies the characterization of the Commission's holding in *First Commonwealth Communications v. Virginia Electric Power Co.* and the other cases cited in **Paragraph 320** of the Complaint. Specifically, the Commission found that the cost of inspection of poles not owned by Virginia Electric Power Company could be allocated to the cable company based upon the

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<sup>734</sup> See, Circuit Map for G925, Exhibit "94."

benefit received by the cable company from such inspection. EAI affirmatively states that Complainants received a benefit from the inspections conducted on SBC-owned poles and should be required to pay for such benefit in the manner assessed. EAI denies the remaining allegations in paragraph 320 of the Complaint.

554. EAI admits that the CATV safety inspections performed by USS included a small number of poles owned by SBC but which are subject to joint use agreements with EAI. Pursuant to such agreements, EAI controls the area on each such pole where it has attachments. EAI is within its rights to inspect those areas to insure that CATV attachments are not trespassing into the areas under EAI's control and thereby creating safety problems.<sup>735</sup> EAI also measured mid-span clearances between poles owned by EAI and SBC. EAI denies the remaining allegations in **Paragraph 321** of the Complaint.

555. EAI affirmatively states that the terms of the June 4, 2003 letter from Wm. Webster Darling to Kyle Birch speak for themselves and to the extent the allegations in **Paragraph 322** conflict with those terms those allegations are denied.

556. EAI affirmatively states that the terms of the June 4, 2003 letter from Wm. Webster Darling to Kyle Birch speak for themselves and to the extent the allegations in **Paragraph 323** conflict with those terms those allegations are denied.

557. EAI states that it is without information sufficient to form a belief in the truth of the allegations in the second sentence of **Paragraph 324** of the Complaint and therefore denies same. EAI denies the remaining allegations in paragraph 324 of the Complaint.

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<sup>735</sup> Declaration of Tony Wagoner at ¶ 6.



558. EAI denies the characterization of the Commission's holding in *First Commonwealth Communications v. Virginia Electric Power Co.* Specifically, the Commission found that the cost of inspection of poles not owned by Virginia Electric Power Company could be allocated to the cable company based upon the benefit received by the cable company from such inspection. EAI affirmatively states that Complainants received a benefit from the inspections conducted on SBC-owned poles and should be required to pay for such benefit in the manner assessed. EAI denies the remaining allegations in **Paragraph 325** of the Complaint.

559. EAI states that the terms of the applicable pole agreements speak for themselves and to the extent the allegations in **Paragraph 326** of the Complaint conflict with such terms those allegations are denied.

560. EAI denies the allegations in **Paragraph 327** of the Complaint. EAI affirmatively states that it, through USS, conducted CATV safety inspections and not physical inventories of cable company contacts as anticipated in Section 7.2 of the various pole attachment agreements. EAI affirmatively states that the provisions of Section 7.2 of the various pole attachment agreements are inapplicable and irrelevant to the safety inspections at the heart of this dispute. EAI affirmatively states that the number of CATV contacts on the poles inspected were necessarily determined as a byproduct of the safety inspection process. EAI affirmatively states that had an actual physical inventory been performed, the cost to Complainants of such an inventory would have likely greatly exceeded the cost of the safety inspections. EAI affirmatively states that each of the Complainants was provided prior notice of the safety inspections and were invited to